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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE CIVIL JURISDICTION**

WRIT PETITION NO. 4150 OF 2013

Sabita Mark Burges

...Petitioner

Vs.

Mark Lionel Burges

...Respondent

Mr.Rohan Cama a/w. Sapna Raichure for Petitioner

Mr. P.S. Chavan for Responden

**CORAM : MRS. ROSHAN DALVI, J.
DATED : 3RD MAY, 2013**

ORDER :

Rule. Made returnable forthwith.

1. The petitioner wife has challenged the order of the Judge, Family Court No.3, Bandra, Mumbai dated 14th March, 2013 allowing the application of the respondent husband to use and occupy one bedroom and to allow him to use facilities like kitchen, hall, w.c and bathroom in flat Nos. B-101 and 102, Wilfred Apartments Co-operative Housing Society Ltd., Plot No.112, St. Leo Road, Bandra(W), Mumbai-400 050. The petitioner has not challenged the order of prohibitory injunction restraining her from selling, disposing off, transferring, letting out, alienating in any manner, the above mentioned matrimonial house and also restraining her from selling or disposing off or part with the articles existing in the house property.

2. In this writ petition the Court is only called upon to see

whether an estranged husband who is prima facie shown to be violent can be allowed into the matrimonial home where the wife resides with her children.

3. The concept of a “battered wife's right of protection against violence” has been considered in common law in England just as the concept of a “deserted wife's' equity” was. In common law a battered wife had a right to be protected from the physical violence of her husband. She would be entitled to a right of injunction for her protection in her matrimonial home.
4. These injunctions were granted upon the principle of justice, equity and good conscience.
5. This right came to be statutorily recognised in the U.K under the Domestic Violence and Matrimonial Proceedings Act 1976 (D.V.Act).

Under Section 1 of the D.V. Act, an injunction could be issued (termed as a matrimonial injunction). The breach of the injunction empowered the Police to arrest the violator.

Under Section 3 of the D.V. Act, Section 1(2) of the Matrimonial Homes Act, 1967 came to be amended. The order of regulating the exercise of the right of occupation by a spouse in the dwelling house came to be substituted by the order of prohibiting, suspending or restricting such a right.

Under Section 4 of the Act, in the case of spouses, who are joint owners of the matrimonial home, the right to occupy it or to prohibit, suspend or restrict the other party could be granted by an order of the Court.

6. Both the spouses are entitled to an equal right in the matrimonial home. This is upon the precondition that both live there peacefully, happily and lovingly. Even in unhappy marriages parties continue to have such rights unless there is violence which has always been protected against by Courts in common law and later under statutory provisions.
7. The specific statutory provision in India has been under Section 19(1)(b) of the Protection of Women from Domestic Violence Act, 2005 (D.V.Act) in which various injunctions are granted in favour of a woman in respect of her residence titled "Residence orders".

The relevant part of Section 19 runs thus:

"19. Residence orders. – (1) While disposing of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order –

(a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

(b) directing the respondent to remove himself from the shared household;

- (c) *restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;*
- (d) *restraining the respondent from alienating or disposing off the shared household or encumbering the same;*
- (e) *restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or*
- (f) *directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so required.*

The husband has claimed in this case that the matrimonial home belongs to both the parties and hence he must be allowed to enter thereupon. The husband has not claimed his right to enter upon the matrimonial home under the aforesaid statutory provision by claiming ouster or violence.

8. This is a case of a wife who filed the initial petition for judicial separation and maintenance. The husband has filed a petition for injunction. Both the petitions are ripe for hearing after interim orders have been passed for maintenance as also for protection of the matrimonial home against transfer or alienation.

9. Thereafter the husband, who is a Seaman, has made an application for entering upon the matrimonial home which he had admittedly left in January, 2009 after the parties had certain

disputes. The wife claims that the disputes were due to the husband's physical violence amongst other disputes. The husband has disputed the violence, but not the disputes. He has in turn alleged violence at the hands of the wife including "with knives".

10. It is common observance that the applications for grant of injunction in respect of the residence and possession of the respondent is essentially seen by Courts upon the proprietary rights of the parties. Since in most cases wives do not own matrimonial homes, they are statutorily given rights therein which were not given to them by Courts under the principles of common law so that they have a right to peaceful enjoyment of their matrimonial home. Section 19 of the D.V Act came to be enacted in the first place granting essentially the wives/women peace against domestic violence in their residence, their title notwithstanding. This statutory grant is upon the sublime principle of human rights prevailing over proprietary rights.

11. The matrimonial home consists of two flats, flat No.101 and 102 in Wilfred Apartments Co-operative Housing Society Ltd., Plot No.112, St. Leo Road, Bandra(W), Mumbai-400 050. The two flats purchased by the parties are combined into one by breaking the middle wall. There is one kitchen, one hall and the remaining bedrooms. It is one consolidated living unit. It is claimed as such. Since the two flats have been amalgamated and used as one they have to be taken as a single unit for considering the claim of the husband. Indeed his claim in his

application is that he is entitled to peaceful occupation of his own house which is described in paragraph 9 of his application as the matrimonial house No.101, 102, Wilfred Apartments Co-operative Housing Society Ltd., Plot No.112, St. Leo Road, Bandra(W), Mumbai-400 050. It may bear repetition to state that both are equally entitled to the said flat unless one of them is violent. No matter that a man may alone own a particular house, he has no right to be violent against his wife or the woman he lives with and if the Court sees any violence he must be restrained from entering upon the residence essentially to secure the wife and children against further violence and similar disputes.

12. The husband claims that until he applied for entering upon the house in which he lived till in January, 2009 the wife had not even alleged domestic violence. I have been shown the initial petition filed by the wife in this behalf. Amongst the allegations made by the wife are allegations in paragraphs 28 and 29 relating to physical domestic violence. This violence of the husband is alleged not only against the wife, but against his two children. It may be enumerated thus:

1. *The respondent was angry and kicked Neva(daughter).*
2. *The respondent had an argument with younger son Nash and violently pushed him across the room. The petitioner intervened and the respondent slapped the petitioner across her face.*

3. *The respondent was so angry he attacked the petitioner and fractured her thumb.*
4. *The respondent attacked the petitioner with fist blow and threatened to kill her and on hearing the noise the neighbour called the police.*
5. *There were daily arguments, scenes and assaults.*
6. *The respondent grabbed Noah's hand, pinned him down and refused to allow him to go to school or exam.*

Of course, merely upon allegations of physical abuse and violence the husband cannot be restrained from entering upon the matrimonial home. These allegations would have to be tested in the petition. The wife would have to stand the cross examination.

13. It must be seen whether this is a prima facie case of violence as proved. The husband's own notes of arguments shows that he was thrown out of the house and not allowed to enter into the house on 26th January, 2009. It shows that he is away from the matrimonial home since then. The husband's own allegations made to rebut the wife's allegations show that police visited his house 4 times. The husband has alleged domestic violence at the hands of the wife, not only at her bare hands but also with knives.

1. *The respondent states that the police visited their house in Singapore 4 times. All 4 times the petitioner attacked the respondent with knives.*

2. *He also alleged that the wife's domestic violence caused his children to cry and scream "mama stop hurting him".*

14. A case of physical cruelty has been alleged to obtain judicial separation. Pending that due to certain disputes the husband admittedly left the home. He has desired to enter thereupon. This would only escalate the situation. There may be further such incidents and disputes. The Court has the duty to prevent more violence. The wife apprehends escalation of domestic violence. She claims that it will become impossible for her and her children to live there in peace.

15. The husband has himself shown that there is another flat close-by which stands in the name of himself and his mother. It has been purchased on 18th February, 1998 in the names of both these parties as is reflected in the agreement signed by both of them. The wife has contended that the petitioner could well reside in the said flat pending the petition. The petitioner has claimed that that flat is not habitable. Both the parties have produced pictures of the flat and of outside the flat. The husband's black & white photocopies do not show the correct position. The wife's coloured photograph shows the correct position. It is stated that the mother does not live in the flat and lives with the husband's brother. The respondent/husband states that it is a single self contained unit and he cannot live there for want of an air-conditioner (AC). The respondent husband would

be entitled to an AC as per his choice in the said flat. The respondent husband has always claimed that he spent lavishly for his children and sufficiently maintained the wife and children. The respondent husband has, therefore, means to purchase an AC. That would make the said flat suitable for his habitation as per his choice.

16. It is wondrous how the husband desires to enter upon such house though he has another house in the locality which is available to him to reside in for the few months that he is on leave from his duty in Merchant Navy pending the petition.

17. The husband's own case of violence by his wife demonstrates his lack of bonafides. It exhibits how he wants to breach the domestic peace that has prevailed in the matrimonial home since 26th January, 2009.

18. It may be mentioned that even in the absence of such an alternate accommodation a violent husband cannot be allowed to enter upon the matrimonial home to cause more apprehension pending the petition. The Court must restrain any illegal activities including domestic violence. However in this case an alternate premises is available. The husband's application is made under common law. He claims the right because he is an equal owner of the flat and has used it as matrimonial home. He would otherwise be entitled to it, but for the violence prima facie seen.

19. In the interest of both the parties the entering by the husband into the matrimonial home must be prevented pending the petition since the husband has admittedly not lived in the matrimonial home since 26th January, 2009.

20. Counsel on behalf of the wife states that the wife is prepared to for trial immediately. He has made others respondents in the petition upon the petitioner contending that based upon her allegations the respondents would have to be heard. They have been served with the summons. So soon as their written statement is filed the issues will be framed and the evidence would begin. The wife would have to be first cross examined. Pending the aforesaid formalities it would not be prudent to allow the respondent to enter into the matrimonial home in view of the apprehended physical domestic violence.

21. Hence the impugned order dated 14th March, 2013 is set aside with regard to allowing the petitioner to use of one bedroom with facilities like kitchen, hall, W.C and bath in flat Nos. 101 and 102, Wilfred Apartments Co-operative Housing Society Ltd., Plot No.112, St. Leo Road, Bandra(W), Mumbai-400 050. The remainder of the order is confirmed. Rule granted to that extent.

22. Writ Petition is disposed of accordingly.

(MRS. ROSHAN DALVI, J.)